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No. 87-1858

Supreme Court, U.S.

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In The
Supreme Court of the United States
October Term, 1987

JOHN S. WISNIEWSKI,

Petitioner,

v.

STATE OF NEW JERSEY,

Respondent.

On Writ of Certiorari to the
Appellate Division of the Superior
Court, State of New Jersey

BRIEF IN OPPOSITION TO PETITION
FOR WRIT OF CERTIORARI

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JURISDICTION

The judgment of the Supreme Court of New Jersey was entered on March 10, 1988 and the petition for writ of certiorari was thereafter filed within time. Jurisdiction of this Court is sought to be invoked under 28 U.S.C. §1257 (3), but Respondent maintains that the present petition is from an interlocutory order rather than a final order.

SUMMARY OF ARGUMENT

Petitioner raises numerous challenges to the New Jersey statute which permits the State to appeal from certain lenient sentences, alleging that the resentencing constitutes a violation of the double jeopardy clause. A grant of certiorari to consider these challenges would be inappropriate because no final order has been entered in New Jersey. Moreover, the issues presented have never been raised by petitioner in the state courts. Finally, the bulk of petitioner's arguments have been recently addressed by the United States Supreme Court and there is no substantial reason for further consideration.

ARGUMENT

POINT I

THE FINALITY DOCTRINE PRECLUDES REVIEW.

Respondent contends that this Court has no jurisdiction to grant review of the present matter because no final order has been entered in the courts of New Jersey.

An examination of the opinion of the Appellate Division reveals that the case was remanded back to the sentencing court "for further proceedings in accordance with this opinion," *i.e.*, for re-sentencing pursuant to the statutes and caselaw discussed therein. (A-9). Although the New Jersey Supreme Court subsequently denied review, this case is far from concluded. Petitioner must be re-sentenced, following which, depending on the outcome, either he or the State or both parties will be able to pursue a further appeal. At such time, petitioner may raise the federal claims he now pursues.

The State fully realizes that the finality doctrine has not been construed rigidly but admits of various exceptions even when there are further proceedings available in State court. *Pennsylvania v. Ritchie*, ___ U.S. ___, 107 S.Ct. 989, 996, 94 L.Ed.2d 40 (1987). Uniformly, however, the exceptions demand that the federal issue be finally decided in the highest court of the State. *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 95 S.Ct. 1029, 1037-1041, 43 L.Ed.2d 328 (1975). The finality doctrine is not a "technicalit[y] to be easily scorned," particularly "when the jurisdiction of this Court is invoked to upset the decision of a State court." *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 124, 65 S.Ct. 1475, 1478, 89 L.Ed. 2092 (1945). Finality is essential to good judicial administration and "avoids the mischief of economic waste and of delayed justice." *Id.*

Although petitioner's federal issues have never been raised by him in the courts of New Jersey, a channel is clearly available. Respondent maintains that the finality doctrine precludes review in these circumstances.

POINT II

PETITIONER'S FAILURE TO RAISE HIS ISSUES IN
STATE COURT PRECLUDES REVIEW.

The State contends that petitioner failed to preserve his constitutional contentions in the state courts of New Jersey. Although he now invokes the doctrine of double jeopardy to challenge the New Jersey statute which permits the State to appeal from certain lenient sentences, this issue was raised neither at the trial level nor in his brief in the Appellate Division of Superior Court. In his petition for certification to the New Jersey Supreme Court, petitioner alluded to double jeopardy, but only in the context of arguing that the State had waived its right to seek incarceration. (A-82 to A-83). Similarly, nowhere below did petitioner articulate his present objections that New Jersey's sentencing appeal statute is unconstitutionally vague and that his bail status constitutes commencement of his sentence.

New Jersey has a clear rule that issues "in no wise alluded to, much less squarely presented, in the courts below. . . need be given no consideration" in our higher appellate tribunals. *State v. Souss*, 65 N.J. 453, 460, 323 A.2d 484, 488 (1974). In light of the failure of petitioner to fully and fairly raise his claims in state court, the State submits that there is an adequate state law procedural ground barring present review of petitioner's federal contentions. *Michigan v. Tyler*, 436 U.S. 499, 512 n. 7, 98 S.Ct. 1942, 1951, 56 L.Ed.2d 486 (1978).

When a contention has not been raised in state court, "the issue is not one properly presented for review" before the United States Supreme Court. *Moore v. Illinois*,

408 U.S.786, 799, 92 S.Ct.2562, 2570, 33 L.Ed.2d 706 (1972). For this Court to grant review of a state court judgment, the record as a whole must show "either expressly or by clear implication that the federal claim was adequately presented in the state system." *Webb v. Webb*, 451 U.S. 493, 496-497, 101 S.Ct. 1889, 68 L.Ed.2d 392 (1981). A casual reference to a federal doctrine "in the midst of an unrelated argument is insufficient to inform a state court that it has been presented with a claim subject to [the] appellate jurisdiction" of the United States Supreme Court. *Board of Directors of Rotary International v. Rotary Club of Duarte*, 481 U.S. ___, 107 S.Ct. 1940, 95 L.Ed.2d 474, 487 n. 9 (1987).

Accordingly, the State submits that the writ of certiorari should be denied for want of presentation of the issues to the courts of New Jersey.

POINT III

CASELAW CONCERNING THE DOUBLE JEOPARDY ASPECTS OF RESENTENCING IS TOO RECENT AND WELL-SETTLED TO WARRANT FURTHER EXAMINATION.

In *United States v. Di Francesco*, 449 U.S. 117, 101 S.Ct. 426, 66 L.Ed.2d 328 (1980), the United States Supreme Court ruled that resentencing under the auspices of a statute which permitted the prosecution to appeal a lenient sentence did not violate the Double Jeopardy Clause. Petitioner's arguments are premised on the notion that *Di Francesco* was wrongly decided and should be overruled. Respondent perceives no "special and important reasons" to grant certiorari to reconsider this opinion. *S.Ct. Rule 17*. Our position is bolstered by the fact that only two and a half years ago, this Court chose

to follow *Di Francesco* in *Pennsylvania v. Goldhammer*, 474 U.S. 28, 106 S.Ct. 353, 88 L.Ed.2d 183 (1985).

The present case is the product of a statute permitting the State of New Jersey to appeal certain categories of lenient sentences. N.J.S.A. 2C:44-1f(2). (A-20). As such, it arises from the same type of enabling statute which yielded the *Di Francesco* holding. Indeed, the Supreme Court of New Jersey placed explicit reliance on *Di Francesco* in upholding the constitutionality of our statute in the face of a challenge on double jeopardy grounds. *State v. Sanders*, 107 N.J. 609, 527 A.2d 442 (1987).

Applying the *Di Francesco* analysis to the present case, petitioner Wisniewski could not have expected that his sentence was final, for it fit one of the categories permitting the State to appeal. Moreover, the trial court explicitly informed defendant that his sentence would not become final for ten days in order to permit the prosecution to appeal. (A-61). Accordingly, if the touchstone of the *Di Francesco* double jeopardy analysis lies in the defendant's expectation of finality, a remand for resentencing in the present matter would not violate constitutional principles.

CONCLUSION

For the reasons stated herein the petition for a writ of certiorari should be denied.

Respectfully submitted,

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